Supreme Court, U.S.
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In The

Supreme Court of the United States

VIDEO MANAGEMENT, INC. d/b/a C & C VIDEO,

Petitioner,

vs.

CITY OF CHARLESTON BOARD OF ZONING APPEALS and LEE BATCHELDER, in his official capacity as Zoning Administrator,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of South Carolina

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the South Carolina Supreme Court err in refusing to consider the petitioner's claim that it had been denied due process and equal protection when the established evidence demonstrates that the petitioner has been singled out for unique treatment by the City of Charleston?

2. Is the City of Charleston's zoning ordinance unconstitutional for vagueness because it defines an adult business as one having a substantial portion of its "stock in trade" devoted to adult material without providing the formula or percentages for "substantial" so that the petitioner can never tailor his operation to avoid the classification as adult?

3. Does the City of Charleston's refusal to define percentages or provide the formula to allow an operator to conform to the ordinance violate the First Amendment's prohibition against free speech?

LIST OF PARTIES TO THE PROCEEDING

All the parties to the proceedings are set forth fully in the caption.

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CITATIONS OF OPINIONS AND ORDERS ENTERED IN THIS CASE

Board of Zoning Appeals Order entered April 2, 2002

Circuit Court Order entered November 26, 2002

Supreme Court unpublished Order entered October 11, 2004

Remittitur entered November 4, 2004

This petition for certiorari followed.

BASIS FOR JURISDICTION

The South Carolina Supreme Court entered its unpublished opinion on October 11, 2004 (App. p. 32). Thereafter the petitioner applied for a rehearing as allowed by the South Carolina Appellate Rules. The Supreme Court entered its final order denying the petition for rehearing on November 4, 2004 (App. 20), which makes this petition of certiorari due in the Supreme Court on or before February 2, 2005, pursuant to Rule 13 of the Rules of the Supreme Court. This Court has authority to review the opinion of the South Carolina Supreme Court pursuant to Rule 10(b) and (c) of the Rules of the Supreme Court, and Title 28, § 1257, U.S.C.A.

In the matter now before this Court, the Supreme Court of South Carolina issued its unpublished opinion that is in direct conflict with this Court's numerous holdings regarding the protection afforded to free speech under the First Amendment. Moreover, the holding of the South Carolina Supreme Court is in direct conflict with universally accepted principles of jurisprudence, establishing the right of litigants to due process under the Fifth

Amendment and equal protection under the Fourteenth Amendment.

The facts in the present matter are undisputed. In an effort to control the alleged negative secondary effects the City claims flows from adult businesses, the City enacted Ordinance 54-120, requiring certain spatial separation requirements, which includes, among other things, that an adult business locate itself in an industrial zone. This appeal does not contest the City's right to do so. Instead, the petitioner in this case operates a general retail business and seeks to avoid the classification as "adult" by selling only the allowable percentage of adult material that does not change his business from general retail to adult. Rather than assist the petitioner in his effort, the City passed a deliberately vague ordinance that keeps secret the threshold percentage that determines whether the petitioner's business is classified as adult or general retail. As reference to the transcript of the hearing reveals, the City concedes that the threshold percentage is in the mind of the Zoning Administrator, and thus it is his unbridled discretion that determines whether an application for general retail is granted or withheld. (App. 44) The Supreme Court of South Carolina refused to address these issues, and the petitioner now seeks review from this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition

the Government for a redress of grievances. Amendment I, United States Constitution.

No person shall be . . . deprived of life, liberty, or property, without due process of law; . . . Amendment V, United States Constitution.

. . . No State shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. Amendment XIV, Section 1, Untied States Constitution.

FACTS AND PROCEDURAL HISTORY

The petitioner has operated a general retail business at 904 St. Andrews Blvd. for over 20 years. The business sells a wide variety of merchandise, both adult and non adult. In 1999, the City of Charleston enacted Ordinance No. 54-120, which is the subject matter of this lawsuit. The ordinance required that adult businesses relocate to industrial zones within three years of the City's ratification of the ordinance. On January 16, 2002, (App. 21), the City of Charleston Zoning Administrator, Lee Batchelder wrote a letter to the appellant, informing the appellant that it was in violation of Ordinance No. 54-120, which classifies as "adult" any business that has a "significant" or "substantial" portion of its stock in trade devoted to adult material. Businesses classified as "adult" must locate in an industrial zone. The appellant made repeated requests for a definition of "substantial" and "significant" in order that it could continue to operate its business as a

general retail store. The City refused to supply the formula and instead continually declared the appellant's business unlawful.

On January 30, 2002, the petitioner appealed the classification of the Zoning Administrator to the City of Charleston Board of Zoning Appeals. The matter came before the Board on March 18, 2002. The City of Charleston Board of Zoning Appeals has 7 members, and its chairman is a local lawyer who represented a judgment creditor of the petitioner, but did not disclose this information to petitioner or his attorneys although he did consult with corporate counsel prior to the hearing and determined that he had no conflict. The Board of Zoning Appeals issued its written order on April 2, 2002, declaring the appellant's business an adult business and directing it to close six hours later. (App. 13) The Board declined to pass on the constitutionality of Ordinance No. 54-120 and further refused to compel the Zoning Administrator to furnish a numerical definition of "substantial" or "significant." At the hearing before the Board, the Zoning Administrator conceded that the percentages that pushed an operator over the line from general retail to adult were not written down or published in any manner but rather were his subjective opinions. (See App. 44)

Following the decision of the Board of Zoning appeals, the petitioner instituted two cases in the Court of Common Pleas for Charleston County. The first case in Common Pleas was the petitioner's appeal for the Board of Zoning Appeals. The second case in Common Pleas was the petitioner's declaratory judgment action, seeking to declare the Charleston Zoning Ordinance unconstitutional for vagueness. The parties consented to a consolidated hearing, and the circuit court judge, J. C. Nicholson, Jr.,

ultimately issued an order sustaining the Board of Zoning Appeals' decision and pronouncing the ordinance sound. Thereafter, the petitioner appealed both decisions to the Supreme Court of South Carolina, which issued a one paragraph, unpublished opinion on October 11, 2004, (App. 1), affirming the circuit court on the ground that the petitioner had no standing to challenge the ordinance and that the circuit court judge properly disposed of the petitioner's constitutional challenges. The Supreme Court refused to consider the petitioner's equal protection challenge by saying only "issue not preserved" without further explanation. After timely applying for a rehearing, the South Carolina Supreme Court denied the petition without comment and issued its remittitur on November 4, 2004.

In essence, the case represents the challenge to the City of Charleston's ordinance on the ground of vagueness and unlawful prior restraint. The City of Charleston deliberately crafted an ordinance to target the appellant and force a classification on him he does not seek. Because the ordiance is deliberately vague, the City can pick and choose on whom it will apply the ordinance. In fact, the City concedes that an admittedly adult business, The Joker, escapes classification for no reason other than the City treats The Joker differently for its own unknown political reasons.

This petition for certiorari followed.

ARGUMENT

QUESTION 1

Did the South Carolina Supreme Court err in refusing to consider the petitioner's claim that it had been denied due process and equal protection when the established evidence demonstrates that the petitioner has been singled out for unique treatment by the City of Charleston?

The Equal Protection Clause provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U. S. Const. Amendment XIV, § 1. Equal protection is satisfied if 1) the classification bears a reasonable relation to the legislative purpose sought to be effected; 2) the relation to the legislative purpose sought to be effected; 3) the members of the class are treated alike under similar circumstances and conditions; and 4) the classification rests on some reasonable basis. *Skyscraper Corp. v. County of Newberry*, 323 S.C. 412, 475 S.E.2d 764 (1996); *Town of Hilton Head Island v. Fine Liquors, Ltd.*, 302 S.C. 550, 397 S.E.2d 662 (1990). The determination of whether a classification is reasonable is initially one for the legislative body and will be sustained if it is not plainly arbitrary and there is any reasonable hypothesis to support it. *Town of Hilton Head Island v. Fine Liquors, Ltd., supra*. "The fact that the classification may result in some inequity does not render it unconstitutional." *Davis v. County of Greenville*, 313 S.C. 459, 465, 443 S.E. 2d 383, 386 (1994); *Whaley v. Dorchester County Zoning Board*, 337 S.C. 568, 524 S.E.2d 404 (1999).

By failing to define "substantial" or "significant," the City has crafted carefully an ordinance that is, by lack of definition, unequal. The City's announced purpose of the ordinance is to mitigate the alleged deleterious effects of a

so-called adult business. (The history and rationale for the negative secondary effects doctrine is discussed in more detail in Question 2, which takes up the vagueness challenge.) Yet, the City of Charleston applies the ordinance to the petitioner who does *not* want to be an adult business while the City exempts an admittedly adult business. Because of the vagueness, the City can pick and choose against whom it will employ the ordinance. The Zoning Administrator concedes his right to wield the ordinance to effect this disparate and unequal treatment:

> Q. Are you familiar with a location called [The] Joker in the City of Charleston?
>
> A. Yes, I am.
>
> Q. Is it fair to say that that is an adult cabaret?
>
> A. Yes, I believe.
>
> Q. And that would meet the definition?
>
> A. Yes.
>
> Q. Would you also agree with me that [it is] within probably 150 feet of a residence?
>
> A. I'm not sure of what the distance is, but I know that there are residential properties.
>
> Q. And that property has not been designated to be amortized, has it?
>
> A. That's correct.

App. 48.

When faced with this question, the South Carolina Supreme Court simply refused to address it, yet the scope of the disproportionate treatment is astonishing. The state Supreme Court's evasiveness on this important issue is a

powerful incentive to this Court to grant the petitioner's application for certiorari, for without it, the petitioner has received no meaningful judicial review of his claim. This Court expressed previously its intolerance of municipalities' unequal treatment of its citizens in a unanimous decision arising out of an application for sewer service. In *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000), this Court held: "Our cases have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. [internal citations omitted] In so doing, we have explained that '[t]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person with the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.'" The unequal treatment is, of course, the exact situation raised by this petition, and because the South Carolina Supreme Court refused to consider the question, the discrimination begs for redress.

Here, an openly adult business is exempted from an application of the ordinance while a business trying hard not to be adult is outlawed by the ordinance. The unequal protection is not a type of "some inequity" as previously recognized by the South Carolina Supreme Court as permissible such as that in *Whaley, supra*, but rather is the type of "plainly arbitrary" decision without "any reasonable hypothesis to support it." *Whaley, supra*. See *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000).

Based on the clear violation of the federal (and the corresponding state constitutional provisions), the South

Carolina Supreme Court simply refused to address the issue, and it is this refusal that supports this Court granting the petition for certiorari in order to address this grave inequality.

QUESTION 2

Is the City of Charleston's zoning ordinance unconstitutional for vagueness because it defines an adult business as one having a substantial portion of its "stock in trade" devoted to adult material without providing the formula or percentages for "substantial" so that the petitioner can never balance his inventory to avoid the classification as adult?

This Court has spoken frequently and clearly in limiting a municipality's power to limit the conduct of its citizens without affording to its citizens the fundamental right to know in advance what conduct is prohibited. See *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 2298-99, 33 L.Ed.2d 222 (1972):

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen,

> judges, and juries, for resolution on an *ad hoc* and subjective basis, with attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden area were clearly marked. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 2298-99, 33 L.Ed.2d 222 (1972) (internal quotations and citations omitted).

It is impossible to read the City's ordinance No. 54-120, and find that it comports with this Court's standards for constitutionality. Because the ordinance lacks any basis by which the petitioner can discern the line, and because the ordinance leaves the classification entirely to the subjective mental impressions of the Zoning Administrator, it is unconstitutionally vague and an unlawful restraint on free speech because it fails to provide the definition of what constitutes an "adult" business and leaves the definition entirely in the mind of the Zoning Administrator. This is unlawful, unbridled discretion.

The petitioner concedes that this Court has approved previously ordinances requiring that adult uses be spatially separated from other uses. In *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), and *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), this Court upheld ordinances that required adult uses to be located from 500 to 1000 feet from locations such as residential areas, churches, schools, parks, and other adult uses. This Court deemed the regulations constitutional because they were content-neutral and aimed at limiting the alleged

negative secondary effects of sexually oriented businesses. The petitioner does not challenge the City's right to enact such content neutral zoning ordinances. Recognizing the right of the City to restrict adult uses, the petitioner here has carefully tailored its business to avoid the classification of "adult" with the corresponding requirement to move to an industrial area. The problem here is that the City of Charleston's standard is subjective and secret, and thus the petitioner is doomed to perpetual failure because he is politically unpopular.

In addressing similar issues in the past, this Court held that such regulations are constitutional only under two conditions: first, the regulations must serve a substantial government interest; and, second, *the regulations cannot unreasonably limit alternative avenues for the communication*. While the petitioner challenges both conditions in the present case, for purposes of evaluating this case as being worthy of further review, it is sufficient that the uncontradicted evidence demonstrates that the City's ordinance incorporates a secret, subjective standard that is blatantly unconstitutional. While it may be a matter more appropriately briefed fully if this Court accepts the case, the petitioner mentions briefly here that the record below demonstrates the City relied entirely on unsubstantial, undocumented, unreported, hearsay speculation of neighbors who have a strong religious objection to the appellant's lawful message to target the petitioner for elimination. The main issue to be considered in evaluating this petition for certiorari is the established fact that the petitioner seeks to escape classification as "adult," and has balanced his inventory to conform to the City's ordinance but he is being punished for being politically unpopular. Because the City adopts the neighbors' religious objections

as its substantial government interest, it then takes the next logical step and designs a deliberately vague ordinance that the petitioner can never meet. In asserting its political will, the City cares nothing for the carefully developed body of constitutional law established by this Court, and the state Supreme Court swept the petitioner's claim aside without even the courtesy of identifying its reasoning. Paradoxically, and one might say hypocritically, the South Carolina Supreme Court previously rejected the exercise of municipal power based on prejudice as a basis to deny a landowner from making use of his property. See *Bannum, Inc. v. City of Columbia*, 335 S.C. 202, 516 S.E.2d 439 (1999) (Board of Zoning Appeals reversed for not allowing halfway house in the face of surrounding property owners' objections.) Here, however, the South Carolina Supreme Court tacitly endorses municipal mistreatment without comment.

The record below demonstrates that the petitioner does not advertise itself as an adult business. The petitioner carries only a small percentage of material that is classified as "adult," and the petitioner takes great pains to operate a business that blends in with the surrounding commercial enterprises. It is no mere accident that the record below is devoid of any complaints by any nearby *businesses*. In other words, other than the religious objection of a vocal minority, there are no objections to the petitioner's operation.

Rather than applying these undisputed facts to the law, the South Carolina Supreme Court did nothing, issuing a memorandum opinion that gives no insight into the reasoning process it used in affirming the circuit court. This lack of explanation alone cries out for redress though this Court granting certiorari, or, at the very least, remanding the case

back to the South Carolina Supreme Court with instructions to explain what rationale the Court employed in rejecting the petitioner's constitutional claims.

In evaluating this application for certiorari, the petitioner relies on the well-developed body of law circumscribing a municipality's power to act arbitrarily in these circumstances. Considering the first prong of secondary effects, the court in *Gammoh v. City of Anaheim*, 86 Cal.Rptr.2d 194, 197 (1999), stated, "The thrust of the constitutional doctrine is that a city has a perfectly legitimate interest in preventing the 'secondary effects' caused by the business, but that means **there have to be some secondary effects.**" (emphasis added). "It is clear from the opinion [in *Renton*] that it was th[e] secondary effects which justified the ordinance as a reasonable time, place and manner restriction on speech and not an infringement of the First Amendment." *Id.* at 201. In the hearing before the Board of Zoning Appeals, the City produced no credible evidence on anything other than religious neighbors who are vociferously opposed to the petitioner's business even though the City concedes that a general retail business can sell some adult material without being classified as an adult business. Rather than tell the petitioner how much, the City responds through Councilman Wendell Gaillard, who also campaigns against college co-eds sunning in Marion Square. These religious neighbors, who lead public prayer vigils against the appellant,[1] testified about alleged

[1] Such public prayer vigils by citizens have even been levied against the members of this Court. The evangelist Pat Roberts led a televised prayer vigil invoking God to place his "heavy hand" upon the hearts of three unnamed Supreme Court justices. The Rev. Roberts did not identify them.

secondary effects without any particulars. However, the facts reveal there are no secondary effects. The petitioner called an expert witness, Fred Wichman (incorrectly identified by the court reporter as "Brad" Wichman), whose real estate credentials are impeccable and whose own office is located "two blocks" (App. 64) from the appellant. Mr. Wichman testified: "The value of my property evidently has increased because the tax assessors are billing me more taxes every year and the building immediately next to me has changed hands twice in the last year three – four years, and it's gone up in price each time it has changed." App. 66. By contrast, the City's witness, Tomasina Moore, was so infirm, she could not even identify the physical orientation of the building, claiming to have seen bad things through a non-existent doorway.

Considering the second prong of the test, reviewing courts, including this Court, have invalidated many distance requirements of 500 to 1,000 feet as impermissible restraints on speech because the distance requirements left too few or no feasible, alternative means for the communication to be presented. See, *Walnut Properties, Inc. v. City of Whittier*, 861 F.2d 1102, 1007-09 (9th Cir. 1988) (holding unconstitutional city ordinance prohibiting sexually-oriented businesses from locating within 500 feet of residences or within 1000 feet of schools, churches, parks, or other such businesses based on finding that "paucity of alternative sites is glaring" and that ordinance "does not allow sufficient alternatives for relocation of adult businesses"), *cert denied*, 490 U.S. 1006 (1989); *CLR Corp. v. Henline*, 702 F.2d 637, 639 (6th Cir. 1983) (invalidating city ordinance prohibiting sexually-oriented businesses from locating within 500 feet of any church, school,

or residence or within 1000 feet of similar business based on finding that in a city with 60,000 people occupying twenty-five square miles the ordinance would permit only two to four sexually-oriented businesses and permitted sites would be restricted to within 2500 feet of frontage in B-2 business district); *Alexander v. City of Minneapolis*, 698 F.2d 936, 938-39 (8th Cir. 1983) (invalidating distance prohibition on sexually-oriented businesses applicable to both new and existing businesses based on District Court's determination that ordinance would "substantially [reduce] the number of adult bookstores and theatres in Minneapolis" and "no new adult bookstores or theatres would be able to open"); *Basiardanes v. City of Galveston*, 682 F.2d 1203, 1213-16 (5th Cir. 1982) (invalidating Galveston ordinance imposing distance restrictions on sexually-oriented businesses that effectively barred such establishments from central business district and limited their location to areas zoned for industrial use that lacked access roads and included no rental establishments); *University Books and Videos, Inc. v. Miami-Dade County, Florida*, 132 F.Supp.2d 1008 (2001) (ordinance declared unconstitutional that permitted one adult business for every 100,000 residents). What is significant about these holdings is the universal suspicion of distance requirements when they achieve a "zone out," and in the present case, the City of Charleston seeks to enforce such spatial separation against a *general retail business* that sells a minority of lawful adult merchandise. The City of Charleston deliberately ignores this Court's holdings in *Young* and *Renton*, and exercises powers never endorsed by this Court. Such obvious contempt for this Court's holdings is precisely why it is so disappointing that the South Carolina Supreme Court did not address these important, fundamental issues, and why it is so critical for this Court

to grant certiorari to prevent municipalities from misusing the state Supreme Court's approval of the City of Charleston's disobedience to *Young* and *Renton*. What the City of Charleston has done with this Court's previous holdings is something like what the National Socialists did with Darwin's theory of natural selection – the City has abused the powers afforded to it under *Young* and *Renton* to levels never contemplated or authorized by this Court.

The record demonstrates that the ordinance is drafted with the specific purpose to insure that the appellant fails. In fact, the City Council drafted the ordinance specifically for the petitioner because there are no "adult" businesses in the City other than an admittedly adult cabaret, "The Joker," which is exempted by the ordinance. (This equal protection argument is addressed in Question I.) The ordinance is unconstitutional on its face because it is deliberately crafted to be unconstitutionally vague and to provide "unbridled discretion" to the zoning administrator to declare a business non-conforming and to order its closing. The City concedes this point as the following colloquy between counsel for the appellant and the Zoning Administrator demonstrates:

> Q. Can you tell this Board and myself and Mr. Goldstein what that threshold [to make a general retail business and adult business] percentage would be or the numbers?
>
> A. What threshold would be?
>
> Q. That means the difference between it being a substantial or significant portion of stock and trade or less than that.
>
> A. I can't give you a specific number, but my guess is that – . . . but my opinion is that if we

were talking about an insubstantial or insignificant number.

Q. Give me a percentage.

A. – that would be somewhere below 10%.

Q. What do you base that on? Does it say anywhere in the ordinance? Does it define the term "significant" or "substantial"?

A. No; it does not define it.

Q. Has anybody given you a figure to say what is significant or substantial?

A. No.

Q. In other words, it's what you decide?

A. That's correct.

App. 44-45.

This is a textbook example of impermissible vagueness and constitutionally infirm unbridled discretion and as such violates the clear minimum standards enunciated by *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 2298-99, 33 L.Ed.2d 222 (1972) and its progeny. In order to prevent the chilling effect of vague laws on constitutionally-protected expression, this Court requires a greater degree of specificity in order for any law that impinges on protected expression to survive a vagueness challenge. *Smith v. Goguen*, 415, U.S. 566, 573, 94 S.Ct. 1242, 1247, 39 L. Ed.2d 605 (1974).

Laws which confer discretion to government officials as to whether to permit or deny expressive activity are unconstitutionally vague. *Cleveland's P.M. on the Boardwalk v. City of Cleveland*, Case No. 1:92CV1412, unreported,

at 15-16, citing *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 169 (1969). "[Without express standards by which to measure an official's actions], *post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression." *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. at 7558, 108 S.Ct. at 2144, 100 L.Ed.2d 771. Due process requires that an ordinance have a minimum degree of definiteness so that an individual has "sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice." *Jordan v. DeGeorge*, 341 U.S. 223, 231-32, 71 S.Ct. 703, 708, 95 L.Ed.2d 886 (1951). The standard to be applied in determining vagueness is whether the law "requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed.2d 322 (1926).

In examining challenges of vagueness pertaining to zoning ordinances which seek to restrict adult establishments, courts have uniformly held that the failure to define adequately the terms necessary to the application of an ordinance make that ordinance void for vagueness. That is precisely what has occurred in the present case when the Zoning Administrator directed C & C to cease operations in his January 16, 2002, letter without defining the parameters under which C & C could operate. Because

the Zoning Administrator's attack on the appellant is clearly politically motivated, he takes great care to avoid identifying the parameters under which the appellant can operate, even in his testimony before the Board of Zoning Appeals. Other courts when faced with deliberate governmental equivocation have not tolerated such transparent vagueness. For example, in *Tiffany's Cabaret of Scottsdale, Inc. v. The City of Scottsdale* (D. Ariz. April 13, 1993), Case No. CIV-92-2325-PHX-RCB, unreported, the United States District Court for the district of Arizona found the City of Scottsdale's zoning ordinance to be unconstitutionally vague as applied because it did not define the term "school." The court found that the failure to adequately define this term led to the exercise of unbridled discretion by city officials in the granting of adult use permits within the city. Here, the constitutional violation is more fundamental. Here the Zoning Administrator can declare an owner an "adult" business without ever informing the owner what she must do to avoid the classification. In Franz Kafka's novel, *The Trial*, the protagonist, Joseph K, finds himself on trial without being informed of the charges. (Kafka knew about the legal process, having studied law at the University of Prague, but choosing, instead, a career in workers' compensation insurance.) Naturally he discovers no defense is possible. Such is the case here. The owner here is like Kafka's Joseph K; he cannot discover the formula and thereby adjust his operation to avoid the City's prosecution. The difference between the two is that the owner here has recourse to the Constitution of the United States. Despite its obligation to follow the United States Constitution, the South Carolina Supreme Court sidestepped its duty and allowed the Zoning Administrator's decision remain without explanation.

Other municipalities' efforts to employ deliberately vague terms have met with little success when reviewed by courts applying constructional protection. For example, in *Entertainment Concepts, Inc. III v. Maciejewski,* 631 F.2d 497 (7th Cir. 1980), the Court of Appeals for the Seventh Circuit held that a village ordinance zoning adult movie theaters as a special use was unconstitutionally vague because it failed to define the term "adult." The court found that the failure to define this term provided no guidance for the enforcement of the special use resolutions and gave village officials unbridled discretion in the determination of which theaters were "adult" movie theaters under the ordinance and which were not. *Id.*

Even the South Carolina Supreme Court, when faced with the same issue in another case, unequivocally stated that a sexually oriented business ordinance that fails to define the terms upon which a City relies for enforcement does not meet state and federal constitutional requirements. *City of Columbia v. Pic-A-Flick Video, Inc.,* 340 S.C. 278, 531 S.E.2d 518 (2000). In that case, the state Supreme Court struck down a Columbia ordinance for its failure to define precisely what a "principle business purpose" is. In striking down the entire ordinance, the Court held:

> When confronted with First Amendment issues, this Court is guided by precedent from the United States Supreme Court. [internal citation omitted] As we stated in *Harkins v. Greenville County,* 340 S.C. 606, 533 S.E.2d 886 (2000), this Court will uphold those zoning laws that comport with the Supreme Court's guidelines as well as with our own case law.

Because the South Carolina Supreme Court failed to follow its own reasoning in the instant case, it is important that this Court grant certiorari to avoid the Supreme Court of South Carolina adopting one constitutional interpretation in its published opinions and a completely antagonistic position in its unpublished opinion.

In the instant case, C & C does not dispute that *one* of its business purposes is to sell lawful adult material. (At the hearing on March 18, 2002, the appellant stipulated 34% of his inventory was "adult." Since that time, appellant has reduced it even more.) However, the record reveals that the appellant in the present case was in the same posture as the appellant in the *Pic-A-Flick* case: "C & C Video offers magazines and videos for sale. At the current time, approximately 12,000 of our videos are "non-adult," and 3,000 are adult." App. 27. The appellant's entered a precise inventory in the record below that demonstrated a 34% portion of inventory as adult. Like the ordinances examined in *Tiffany's Cabaret of Scottsdale Inc., Entertainment Concepts, Inc, III, supra,* and *City of Columbia v. Pic-A-Flick Video, Inc., supra,* the City of Charleston's ordinance is unconstitutionally vague as a result of its failure to define the several key terms critical to its application. Because neither "significant" nor "substantial" are defined, and the failure either to provide definitions for these terms or to provide the formula by which they can be calculated, vests City's officials with unbridled discretion. This discretion is in violation of the previous holdings of this Court, and the Supreme Court of South Carolina erred in refusing to take up the question and void the ordinance.

QUESTION 3

Is the City of Charleston's refusal to provide a definition to a non-adult business to keep it from balancing its inventory so the City can shut it down an unlawful prior restraint?

As stated in the preceding section, regulatory schemes that place unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship. *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. at 757, 108 S.Ct. 2138, 100 L.Ed.2d 771. "[A]n ordinance . . . which makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official – as by requiring a permit or license which may be granted or withheld in the discretion of the official – is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 226, 110 S.Ct. 593, 107 L.Ed.2d 603, (quoting *Staub v. City of Baxley*, 355 U.S. 313, 322, 78 S.Ct. 271, 2 L.Ed. 302 (1958)). "[Without express standards by which to measure an official's actions], *post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression." *City of Lakewood v. Paint Dealer Publishing Co.*, 486 U.S. at 758, 108 S.Ct. at 2144, 100 L.Ed.2d 771.

The analysis employed here is similar to question 2 above, but here the issue is addressed with some special notation that the petition for certiorari under consideration raises the additional protections afforded by the First Amendment's guarantee to free speech. In addition to its

other constitutional infirmities discussed above, Ordinance 54-120 also fails to provide any type of meaningful guarantee that the fundamental right to free speech will not be unlawfully impaired by operation of the ordinance. As discussed above, the petitioner here does not desire to operate an adult business. As set forth above, the classification lays entirely with the unbridled discretion of the Zoning Administrator and thereby grants the City officials applying the Ordinance unbridled discretion. As previously discussed, the Ordinance contains vague provisions, which permit unbridled discretion in the hands of municipal officials with no guarantee of constitutionally mandated prompt judicial review. Therefore, all of the arguments advanced in the vagueness section apply equally here to establish that the challenged Ordinance's vague language constitutes an unconstitutional prior restraint on constitutionally protected expression. Because the Ordinance confers unbridled discretion upon Mr. Batchelder, it fails to provide the constitutionally required standards for determining whether to grant, deny, revoke, or not renew a business permit and fails to establish the narrow, objective, and definite standards required for such resolutions as defined by this Court in *Shuttlesworth v. City of Birmingham*, 354 U.S. 147, 150-151, 89 S.Ct. 935, 22 L.Ed.2d 162: "[T]he prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional".

As stated, above because terms such as "significant" and "substantial" are not defined, and because there is no mechanism for discovering the secret formula that governs them, the ordinance provides absolutely no guidance as to the meanings of those terms or the manner in which the Zoning Administrator is to investigate and make his

determination or notify the owner of alleged violations. It is akin to police officers patrolling the streets that have no posted speed limit. When the ticketed motorist asks under which speed must he travel, this Court does not permit an officer to say, "you must not exceed the limit that is in my mind." The absence of such a posted limit makes the ordinance operate entirely on the decision of the Zoning Administrator, and when dealing in the sensitive area of protected free speech, the City of Charleston must tread carefully.

In *Avenue Grille, Inc. v. Rootstown Township, et al.*, 5:94CV67, slip op. at 9, the U.S. District Court (Northern District of Ohio, Eastern Division) found that Rootstown Township failed to set forth narrow, objective, and definite criteria regarding its denial provisions. The failure to do so resulted in an impermissible "investiture of excess discretion in government officials" which did "not sufficiently constrain the discretion of [those officials]." *Avenue Grille, Inc. v. Rootstown Township et al.*, Case No. 5:94CV67, slip op. at 9. The failure to define the same terms and phrases in the denial provisions of Ordinance 54-20 likewise impermissibly confers upon governmental officials the discretion to establish whatever criteria they desire for these terms and to apply that criteria in an arbitrary and discriminatory manner. The present case establishes a perfect example of such arbitrary and discriminatory action. Thus, the City's ordinance, like that in *Avenue Grille, Inc.* must fall.

Over the years, this Court has spoken with clarity and with a single voice on the issue of protecting free speech. In the seminal case of *FW/PBS, Inc. v. Dallas*, 493 U.S. 215 (1990), this Court said:

While "[p]rior restraints are not unconstitutional per se . . . [a]ny system of prior restraint . . . comes to this Court bearing a heavy presumption against its constitutional validity." [internal citations omitted] Our cases addressing prior restraints have identified two evils that will not be tolerated in such schemes. First, a scheme that places "unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship." [internal citations omitted] "It is settled by a long line of recent decisions of this Court that an ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of any official – as by requiring a permit or license which may be granted or withheld in the discretion of such official – is an unconditional censorship or prior restraint upon the enjoyment of those freedoms.'" *Shuttelsworth, supra*, at 151 (quoting *Staub, supra*, at 322).

Second, a prior restraint that fails to place limits on the time within which the decision maker must issue the license is impermissible. *Freeedman, supra*, at 59; *Vance v. Universal Amusement Co.*, 445 U.S. 308, 316 (1980) (striking statute on ground that it restrained speech for an "indefinite duration"). In *Freedman*, we addressed a motion picture censorship system that failed to provide for adequate procedural safeguards to ensure against unlimited suppression of constitutionally protected speech. 380 U.S., at 57. Like a censorship system, a licensing scheme creates the possibility that constitutionally protected speech will be suppressed where there are inadequate procedural safeguards to ensure prompt issuance of the license. In *Riley v.*

> *National Federation of Blind of N.C., Inc.*, 487 U.S. 781 (1988), this Court held that a licensing scheme failing to provide for definite limitations on the time within which the licensor must issue the license was constitutionally unsound, because the "delay compel[led] the speaker's silence." Id., at 802. The failure to confine the time within which the licensor must make a decision "contains the same vice as a statute delegating excessive administrative discretion," *Freedman, supra*, at 56-57. Where the licensor has unlimited time within which to issue a license, the risk of arbitrary suppression is as great as the provision of unbridled discretion. A scheme that fails to set reasonable time limits on the decision maker creates the risk of indefinitely suppressing permissible speech.

Here, of course, the South Carolina Supreme Court refused to address the issue, and because the matter under consideration raises the question of government suppression of lawful speech, this Court should grant certiorari.

CONCLUSION

As may be seen by reference to the State Supreme Court's decision in this case, there is no decision. Even though the present matter raises fundamental constitutional questions of the greatest significance, the South Carolina Supreme Court ignored the issues and affirmed the circuit court with no explanation. Even the attenuated record contained in the appendix demonstrates that the City of Charleston specifically set out to put the petitioner out of business for political reasons. This Court should

grant the petition for certiorari so that these important matters can be fully briefed, or, at the least, remand the case to the South Carolina Supreme Court with instructions to issue a written opinion digesting the controlling precedent and applying it to the facts raised by this case.

Respectfully submitted,

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March 3, 2005

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THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 239(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Video Management, Inc. d/b/a
C&C Video, Appellant,

v.

City of Charleston Board of Zoning Appeals,
and Lee Batchelder, in his official capacity as
Zoning Administrator Respondents.

Appeal from Charleston County
J.C. Nicholson, Jr., Circuit Court Judge

Memorandum Opinion NO. 2004-MO-053
Heard September 21, 2004 – Filed October 11, 2004

AFFIRMED

Thomas R. Goldstein, of Belk, Cobb, Infinger & Goldstein, P.A., of Charleston; and H. Louis Sirkin, of Sirkin, Pinales, Mezibov & Schwartz, of Cincinnati, Ohio, for appellant.

Charlton DeSaussure, Jr., of Haynsworth Sinkler Boyd, PA, of Charleston; and Timothy A. Domin, of Clawson & Staubes, LLC, of Charleston, for respondents.

PER CURIAM: Affirmed pursuant to Rule 220(b), SCACR, and the following authority: Issues 1 and 2: *Centaur, Inc. v. Richland County*, 301 S.C. 374, 392 S.E.2d 165 (1990) (no standing where ordinance clearly applies); Issue 3: *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976) (findings of trial judge will not be disturbed on appeal unless without evidence reasonably supporting them); Issue 4: *Fraternal Order of Police v. South Carolina Dep't of Revenue*, 352 S.C. 420, 574 S.E.2d 717 (2002) (issue not preserved); Issue 5; *Centaur*, *supra* (amortization period reasonable); Issue 6: *Fraternal Order of Police*, *supra* (issue not preserved).

TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	NINTH JUDICIAL CIRCUIT CASE NO.: 02-CP-10-1459
Video Management, Inc., d/b/a C & C Video, Appellant v. City of Charleston Board of Zoning Appeals, Lee Bathchelder [sic] in his official capacity as Zoning Administrator, Respondent.	ORDER (Filed Nov. 26, 2002)

This is an appeal of a decision from the Board of Zoning Appeals – Zoning for the City of Charleston. The Appellant filed a summons and complaint appealing the decision of the Board. This matter came before the Court for Oral argument. At that time, Appellant indicated that they were making both an appeal and a constitutional challenge to the ordinance in the nature of a declaratory action. On its own motion, this Court bifurcated the proceedings as between the appeal and the constitutional challenge and permitted each part to submit supplemental factual materials to consider the constitutional issues. this, order relates only to the appeal from the decision of the Board of Appeals – Zoning. Defendant's constitutional issues are addressed in a separate order reflecting the bifurcated nature of the proceedings.

The standard for review for the appeal of the decision of the Board of Zoning Appeals is set forth in S.C. Code § 6-29-830 *et seq*. The factual findings of the board must not be disturbed if there is evidence to support those findings. The Court is not permitted to take additional testimony. This Court finds that the Board of Zoning Appeals did not abuse its discretion in that there is factual support in the record for those findings.

The Court further finds that there is no error of law in the Board of Zoning Appeals decision. The board correctly found that the respondent was an adult book/video store as that term is defined in the City of Charleston zoning ordinance.

Appellant further claims that some conflict of interest exists from the Chairman's son, a lawyer, representing a client in the time frame of 1997-1999, in an unrelated case, against a witness-employee of the bookstore, a corporation. Clearly this does not rise to the level of disqualification of the Chairman of the Board of Zoning Appeals. Appellant cites the Cannons of Judicial Conduct, which are at best applicable only by analogy. However, even citing those cannons [sic], there is no conflict of interest. First, the case against the witness was over at the time of the hearing. Second, the matter involves a corporation, Video Management Inc. It does not involve the individual whom the Chairman's son sued for a client. Third, the witness-employee expressly stated that he was not a shareholder of the corporation. Under the circumstances, even if the Chairman was held to the standards of the Cannons of Judicial Conduct, he would not have to recuse himself.

Further, if there was some objection to the chairman, then the Appellant should have brought it to the attention of the Chairman by way of a request for the Chairman to recuse himself. The Appellant, now unsatisfied with the ruling wishes to claim some remote alleged conflict of interest.

Accordingly, the decision of the Board of Appeals – Zoning is hereby affirmed and the appeal of petitioners is hereby denied.

AND IT IS SO ORDERED!

/s/ J.C. Nicholson, Jr.
J.C. Nicholson, Jr.
Presiding Judge

11/20/02

STATE OF SOUTH CAROLINA)	IN THE COURT OF
)	COMMON PLEAS
)	NINTH JUDICIAL
)	CIRCUIT
)	CASE NO.:
COUNTY OF CHARLESTON)	02-CP-10-1459

Video Management, Inc., d/b/a C & C Video, Appellant	ORDER
v.	
City of Charleston Board of Zoning Appeals, Lee Bathchelder [sic] in his official capacity as Zoning Administrator, Respondent.	(Filed Nov. 26, 2002)

This is an appeal of a decision from the Board of Zoning Appeals-Zoning for the City of Charleston. The Appellant filed a summons and complaint appealing the decision of the Board. This matter came before the Court for oral argument. At that time, Appellant indicated that they were making both an appeal and a constitutional challenge to the ordinance in the nature of a declaratory action. On its own motion, this Court bifurcated the proceedings as between the appeal and the constitutional challenge and permitted each part to submit supplemental factual materials to consider the constitutional issues. The appellant indicated that this would allow sufficient development of any factual issues. This order relates to the constitutional challenge. At the request of the parties, this Court has considered the record before the Board of Appeals – Zoning, including the transcript of the testimony, and the affidavits submitted by the parties after the

hearing before this Court. Having given all parries a full and fair opportunity to provide any additional matters this Court hereby finds that the City's zoning ordinance as it relates to the designation adult book/video store is a valid constitutional restriction in the nature of a time, place and manner restriction which is not void for vagueness.

The City has duly enacted a zoning ordinance which restricts operation of certain adult businesses including adult book/video stores to light industrial and heavy industrial areas. Video Management, Inc. presently operates in a area zoned "general business" at 904 St. Andrews Boulevard within the City of Charleston, which is near a residential neighborhood.

From the materials, it is undisputable that Video Management Inc. sells adult books and videos as defined in the ordinance. Video Management challenges the ordinance on the grounds that the phrase "substantial or significant" is vague, that the ordinance's amortization clause is unconstitutional, that the City should be required to show negative secondary effects, and that this case should be governed by the decision in *City of Columbia v. Pic-A-Flick Video,* 340 S.C. 278, 531 S.E.2d 518 (2000).

The City of Charleston uses language in its ordinance which is substantially similar to that approved by the United States Supreme Court in *Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976).

In *Young,* the Court permitted the regulation of "an[y] establishment having as *a substantial or significant portion* of its stock in trade, books, magazines, and other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing or relating

to 'Specified Sexual Activities' or 'Specified Anatomical Areas' [as defined]" 427 U.S. at 53.

This is not a case similar to *City of Columbia v. Pic-A-Flick Video, Inc.,* 531 S.E.2d 518 (S.C. 2000). In that case, decided on the posture of an appeal from a preliminary injunction, involved 250 adult videos out of 8000 titles and only4.5 percent of revenue from adult films.

This facility had an admitted minimum of 34% of its stock of the adult type described in the ordinance as of the time of the hearing before the Board of Zoning Appeals. The Board of Zoning Appeals found and this court finds as well that this number is a minimum percentage. It was a number offered by Video Management by counting every soda as a unit and 2500 trading cards valued at twenty five cents each as a unit.

After hearing at the Board of Zoning Appeals, appellant claims that the store was entirely changed. The parties were given the opportunity to present additional information by affidavit. The supplemental affidavit of Lee Batchelder states that the facility has a sign up stating that only persons over the age of 18 are permitted to enter. The facility has apparently put up for display a number of out of date videos and old, worn paperback books. Even if the out of date paperbacks and videos were counted as bona fide items held for sale, the percentage of adult materials were estimated to be sixty percent. Thus, it would appear that there has not been a significant change since the time of the hearing.

Where it is clear that a substantial or significant portion of the stock and trade is in adult materials, the entity is an adult book/video store. In *Centaur Inc. v. Richland County,* 392 S.E.2d 165 (S.C. 1993), the Court

following United States Supreme Court precedent held that the applicant cannot claim a void for vagueness challenge on behalf of others. The court held that Centaur lacked standing to assert a void for vagueness challenge where the business clearly had as one of its "principal business purposes" the sale of adult material.

The South Carolina court cited *Young v. American Mini Theaters, Inc.* 427 U.S. 50 (1976), which stated, "both theaters offer adult fare on a regular basis. . . . It is clear, therefore, that any element of vagueness in these ordinances has not affected these respondents."

The Appellant claims that the zoning administrator has unbridled discretion to declare the percentage of materials that are adult. The City zoning administrator testified that he would believe that a ten percent threshold would be appropriate to distinguish between substantial and insubstantial. However, this must he viewed in context. A business with several thousand adult videos may still have a substantial portion of its stock in adult materials if it artificially inflates the non adult totals by stocking a hundred thousand marbles or pieces of bubble gum.

The unbridled discretion argument comes from prior restraint cases. Licensing systems which involve prior restraint of speech demand a higher level of scrutiny than mere zoning classification systems. *See FW/PBS, Inc. v. City of Dallas,* 093 U.S. 215 (1990). Again, the language of the ordinance is reasonably specific applying to establishments with a "substantial" or "significant" amount of their stock in trade in the adult materials described in the ordinance. To the extent that the ordinance survives constitutional challenge, there is no defect in the zoning

administrator explaining that a strict percentage system is not utilized in the City, although less than ten percent of the stock in adult materials may not be substantial or significant, depending on the circumstances of the stock offered for sale.

The Appellant argues that the City must show negative secondary effects in order to uphold its ordinance. In *City of Renton v. Playtime Theaters, Inc.* 475 U.S. 41 (1986), the Court of Appeals for the Ninth Circuit struck down a zoning ordinance enacted by the City of Renton, a 32,000-population suburb of Seattle, because it was enacted without the benefit of studies specifically relating to "the particular problems or needs of Renton." 475 U.S. at 50. The Supreme Court reversed finding this was an "unnecessarily rigid burden of proof" and held that Renton was entitled to rely on the experiences and studies of other cities:

> We hold that Renton was entitled to rely on the experiences of Seattle and other cities, and in particular on the "detailed findings" summarized in the Washington Supreme Court's Northend Cinema opinion, in enacting its adult theater zoning ordinance. The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses. That was the case here.

475 U.S. at 51-52. The Court went on to say that the fact that Renton chose a different form of regulation to respond to the problems created by sexually oriented businesses than cities whose evidence it relied on was

also not relevant to the issue of whether sexually oriented businesses cause negative secondary effects from one community to another. Citing *Young,* the Court reiterated that cities "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." 475 U.S. at 52, citing *Young,* 427 U.S. at 71.

The Eighth Circuit wrote: "This court has rejected the argument that adult business ordinances must be founded upon local experience. *Postscript Enterprises v. City of Bridgeton,* 905 F.2d 223, 226-27 (8th Cir. 1990) ('To insist that governmental interests justifying such legislation could only be found in specific local experiences and conditions would be unrealistically to require deliberate subjection to those experiences and conditions before attempting to avoid them.

Further, in *Pic-A-Flick,* the South Carolina Supreme Court held that it was not necessary for a city to show negative secondary effects in the neighborhood.

The Appellant claims that the three year amortization provision is unconstitutional. A two year amortization period was upheld as valid by the South Carolina Supreme Court in *Centaur Inc. v. Richland County,* 392 S.E.2d 165 (S.C. 1990). Amortization clauses are almost uniformly upheld. *See Hart Bookstores, Inc. v. Edmisten,* 612 F.2d 821 (4th Cir. 1979) (upheld ordinance providing a six-month amortization period for pre-existing, nonconforming adult uses); *Northend Cinema, Inc. v. City of Seattle,* 585 P.2d 1153 (1978) (upheld ordinance providing a 90-day amortization period for pre-existing, nonconforming sex theaters); *Castner v. City of Oakland,* 180 Cal. Rptr. 682 (1982) (upheld ordinance regulating adult entertainment activity providing a one-year amortization period under which owner can apply for up to a two-year extension);

City of Vallejo v. Adult Books, 219 Cal. Rptr. 143 (1985) (upheld ordinance regulating adult bookstores and theaters providing a one-year amortization period under which owners could apply for an extra year if they could show extreme hardship); *Cook County v. Renaissance Arcade,* 522 N.E. 2d 73 (Ill. 1988) (upheld ordinance providing a six-month amortization period under which an additional six months is given to any business which applies), and *SDJ, Inc. v. City of Houston,* 636 F. Supp. 1359 (S.D. Tex. 1986), *aff'd.* 841 F.2d 107 (5th Cir. 1988) (upheld six-month amortization of sexually oriented businesses).

There is no constitutional infirmity based upon the amortization portion of the City of Charleston zoning ordinance.

Appellant also claims that they have effectively been zoned out of existence and that this constitutes an unconstitutional restraint. The testimony at the Board of Zoning Appeals established that there were some twenty five alternate sites in the City were [sic] a business such as this could locate. Under these facts, Appellants cannot claim to be zoned out of existence.

Accordingly, the decision and ruling of this Court is that the City of Charleston zoning ordinance related to adult book/video store is not unconstitutional.

AND IT IS SO ORDERED!

/s/ J.C. Nicholson, Jr.
J.C. Nicholson, Jr.
Presiding Judge

Anderson, South Carolina
November 20, 2002

STATE OF SOUTH CAROLINA) **BOARD OF ZONING**
) **APPEALS – ZONING**
) **OF THE CITY OF**
THE CITY OF CHARLESTON) **CHARLESTON**

IN RE: Video Management, Inc.) **FINAL ORDER**

FINDINGS OF FACT

1. That the matter comes before from an appeal of the zoning administrator's determination that the business at 904 St. Andrews Boulevard is an adult book/video store operating in a location in violation of the zoning ordinance of the City of Charleston and that any amortization period has expired. The zoning administrator notified business/appellants in writing that the business must cease and desist operation of an adult book/video store at that location as of February 9, 2002. That decision was appealed by Video Management, Inc., the operator of the business at 904 St. Andrews Boulevard, on the grounds that the business is a general retail business and that the ordinance is unconstitutional.

2. That certain stipulations were reached between the parties and announced on the record. Those stipulations are accepted by the board and incorporated herein by reference. Note that one member of the board recused himself from the hearing of this matter. All other board members participated and were present for all testimony.

3. That the Video Management, Inc. store location is 904 St. Andrews Boulevard which is located within the City of Charleston and is presently zoned GB (General Business).

4. That the City has duly enacted a zoning ordinance which includes provisions relating to adult book/video stores. That the ordinance provides that an adult book/video store is an establishment "having, as a substantial or significant portion of its stock in trade, books, magazines, videos, and/or other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing or relating to 'specified sexual activities' or 'specified anatomical areas' (as defined herein) or an establishment with a segment or section devoted to the sale, rental or display of such items." Specified sexual activities and specified anatomical areas are defined in the ordinance.

5. That the ordinance does not allow adult book/video store(s) in zoning area General Business (GB); such establishments are allowed in light industrial and heavy industrial zoned areas.

6. That after a review of all of the evidence, the Board finds as a matter of fact that a "substantial" and "significant" amount of the stock in trade is of the type described in the ordinance. This is our finding in light of the testimony that was presented and the credibility of the witnesses.

7. That after a review of all of the evidence, the Board would also find as a matter of fact that there are essentially three portions of the store separated by walls and doors. There is a lingerie section as one enters. There is a middle section offering adult videos and magazines. In this section there are also sex toys and/or adult novelties. There is a back room where adult videos are shown in various booths. Each section is separated by a doorway.

8. Before the board addresses further findings of fact as it relates to the percentages of certain stock, the

board would caution that the ordinance itself does not refer to percentages. It merely refers to a substantial or significant amount. As is illustrated by the findings below, percentages can be both misleading and manipulated. To the extent that we listened to the testimony and made certain factual conclusions, we submit our remaining factual findings about the stock of the store using the words "alternatively and additionally." In other words, where so noted, we find as a matter of fact the findings are each true independently of one another. To the extent they assist in the determination of the issues in this case, and because there was a request by the parties to make specific findings of fact, we offer our factual findings.

9. Alternatively and additionally, the appellant/business stipulated that 34% of the material in the store was of the type described in the ordinance. The zoning administrator through counsel took the position this was not a fair percentage and that the testimony would show that more than 34% of the stock was of the type described in the ordinance. The board is of the view that there was at least 34% of the type of material defined in the ordinance and the board is of the view that as a matter of fact 34% would constitute a substantial and significant amount as those words are used in the City's ordinance.

10. Alternatively and additionally, although the board finds that 34% would be substantial and significant as matter of fact, the board agrees with zoning administrator's position the evidence did not show this to be a fair percentage. As a simple matter of the credibility of the witnesses, we find as a matter of fact that approximately fifty percent of the store's materials were of the type described in the ordinance as was consistent with the zoning administrator's testimony and that of the police officer who performed a visual inspection.

11. Alternatively and additionally, the allegedly 66% non-adult book/video tally from the inventory list included items which the zoning administrator and the police officer and the former customer testified they did not see available for sale. For example, the trading cards which allegedly accounted for 2500 units were not observed by either the zoning administrator in his two trips to the store, the police officer in his two trips to the store, or the former customer. As a finding of fact, the board would conclude that if trading cards were a substantial and significant portion of the business, the board would expect that at least one of the witnesses would have noticed that material.

12. Alternatively and additionally, the 66% non adult book/video figure was established by counting each soda and each snack as a unit, by counting each sports trading card which the store manager said were sold for approximately twenty five cents as a separate unit, and by counting thousands of items of unknown value that were in storage. Nothing in the ordinance requires the zoning administrator or board to count each individual soda or bag of candy or trading card equally to a video with a sales price of twenty dollars or more. Looking at the totality of the inventory, we would find that the 34% adult video figure is too low and a finding of a higher percentage is warranted.

13. Alterative [sic] and additionally, the 66% non adult book/video figure was established through 600 paperback books being classified as non-adult under the premise that they contained no pictures. There is nothing limiting the scope of the ordinance in such a manner and accordingly, as a finding of fact, the inventory list offered by the appellant/business was deficient in that regard.

14. As an additional matter, we were given testimony about alternate locations. We would again caution that the ordinance does not discuss alternate locations as a requirement. However, we were asked to listen to testimony about this and make factual findings. Therefore, we will do so for the benefit of the parties and at their request.

15. On the point of alternate locations, there was testimony from the zoning administrator and there was testimony from a local real estate professional who was qualified as an expert.

16. As a finding of fact in light of all of the evidence, we would find that there are approximately twenty five alternative sites where a business such as this can be located within the City of Charleston, including some larger sites which could be subdivided or where only a portion could be leased. There was insufficient credible evidence presented to rule out any of the sites presented by the City. We find as a matter of fact that at the time of the hearing two sites had real estate signs advertising that the location was "available." Although there was testimony from the real estate expert that some of the sites were unsuitable, this witness clarified that this was meant that the locations were out of the way and did not have much traffic. The witness clarified that this was not his area of expertise and did not know what kind of visibility was necessary to run a profitable adult book/video store. We as a matter of fact would conclude that the sites are otherwise alternate lawful sites, but we make no conclusion about what sites could be profitable or unprofitable. There was simply insufficient evidence to suggest that the alternate sites would be economically unavailable. We make no conclusion about what improvements would have to be made to run an adult book store at those locations, although they all appear to have road access to some degree.

17. We find as a matter of fact that three years has expired since the ordinance was passed amortizing nonconforming adult book/video stores over a three year period. Said ordinance was passed February 9, 1999. We find as a matter of fact that a three year amortization period is not unreasonably short to apply to a business of this type where the testimony established that the stock and equipment could be easily transported to another location. Although there was testimony that there were eight years left on the lease, the business failed to produce a copy of the lease pursuant to a subpoena issued and, in any event, the remaining terms of the lease can be used for something else which is consistent with the zoning classification.

CONCLUSIONS OF LAW

1. Based upon the factual conclusions above; this business at 904 St. Andrews Boulevard is an adult/book video store as defined by the zoning ordinance. The ordinance specifies that businesses of this type shall be located in light industrial and heavy industrial zoned areas. They are not allowed to be located within a GB (General Business) district.

2. The law recognizes that where the zoning laws change or where a property is annexed into the City with a particular use already on the property owner may acquire a right to a lawful nonconforming use. However, the law also favors discontinuation of nonconforming uses. Amortization periods are a common means of phasing out lawful nonconforming uses. The zoning ordinance provides for a three year amortization period for a business of this type and that period of time has expired. Accordingly, upon the expiration of the amortization period, this lawful nonconforming use became an unlawful nonconforming use.

3. Business/appellant also asks that we declare the zoning ordinance unconstitutional. We do not believe that we have the authority as a zoning board of appeals to declare a, lawfully enacted zoning ordinance unconstitutional. We have, however, allowed the business to present all of its constitutional arguments for the purposes of preserving the record.

4. The decision of the zoning administrator is hereby affirmed and the business shall comply with the decision of the zoning administrator to cease and desist operation of the business as of 12:01 a.m. April 3, 2002.

5. This is the unanimous decision of the Zoning Board of Appeals.

/s/ Leonard Krawcheck
Leonard Krawcheck
Chairman

Charleston, South Carolina

April 2, 2002

[SEAL]

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

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November 4, 2004

Thomas R. Goldstein, Esquire
Belk, Cobb, Infinger & Goldstein PA
P.O. Box 71121
Charleston, SC 29415

Re: Video Management v. City of Charleston

Dear Counsel:

The Court has issued the following order on your Petition for Rehearing:

"Petition for Rehearing is denied.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E.C. Burnett, III J.

s/ Costa M. Pleicones J.

November 04, 2004."

Ratification
Number 1995-537

AN ORDINANCE

TO AMEND SECTION 54-2 DEFINITIONS, OF THE ZONING ORDINANCE OF THE CITY OF CHARLESTON TO REVISE THE DEFINITION FOR ADULT BOOK STORE.

WHEREAS, City Council adopted ordinance 1982-24 on March 9, 1982, to regulate adult sexually oriented businesses to ensure that their adverse effects would not contribute to the blighting or downgrading of surrounding uses and adjacent areas; and

WHEREAS, it is the interpretation of the Zoning Administrator that adult sexually oriented video stores are included under the current definition "adult book store" as adopted in ordinance 1982-24, although this specific type of use is not explicitly stated in the *Zoning Ordinance*;

WHEREAS, it is the intent of City Council to clarify that adult sexually oriented video stores are restricted in the same manner as "adult book stores" by revising this definition;

NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND COUNCIL-MEMBERS OF CHARLESTON, IN CITY COUNCIL ASSEMBLED:

Section 1. Section 54-2 is hereby amended by deleting in its entirety the definition for "Adult Book Store" and substituting in its place and stead the following:

"*Adult Book / Video Store.* An establishment having, as a substantial or significant portion of its stock in trade, books, magazines, videos, and/or other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" (as defined herein) or an establishment with a segment or section devoted to the sale, rental or display of such material."

Section 2. This ordinance shall become effective upon ratification.

STATE OF SOUTH CAROLINA

IN THE CITY OF CHARLESTON

BEFORE THE BOARD OF ZONING APPEALS

IN RE: 904 SAINT ANDREWS BOULEVARD
TMS: 418-11-00-214

DATE:	MARCH 18, 2002
TIME:	3:15 p.m.
LOCATION:	City of Charleston Zoning Office 75 Calhoun Street Charleston, SC
REPORTED BY:	PATRICIA L. THOMPSON, Registered Professional Reporter

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Computer-Aided Transcription By:

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[2] BEFORE:

CITY OF CHARLESTON
BOARD OF ZONING APPEALS:

LEONARD KRAWCHECK, Chairman
SAMUEL H. ALTMAN
WALTER H. SMALLS, JR.
MARGARET SMITH
SANDRA CAMPBELL
RUSSELL ROSEN

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(INDEX AT REAR OF TRANSCRIPT)

[3] THE CHAIRMAN: This is a special meeting of the City of Charleston Board of Zoning Appeals held on March 18, 2002. We're expecting Mr. Rosen to come shortly. I'm just not going to wait for him any longer.

Present are Miss Campbell, Mr. Smith, Mr. Smalls, Mr. Altman and Mr. Krawcheck. On my right, the city legal staff and this Board's counsel is Susan Herdina, Esquire, and then we have Miss Smith, Ms. Ashby and Mr. Batchelder from the city planning staff. I understand that Tim Domin, Esquire, represents the City Zoning Administrator and Mr. Thomas Goldstein represents the appellant along with co-counsel whose name is Mr. Sirkin. These proceedings are being recorded. For those of you in the public who speak, I'm going to ask that you state your names.

And we have an agreed upon procedure for this hearing. What we're going to do is we're going to allow each side, beginning with the city, an opening statement that will be five plus minutes – hopefully no longer than ten minutes – and then we will take evidence beginning with the city. The city will present its case first. We'll hear direct testimony, cross-examination and recross, if you [4] wish, and we'll hear from the appellant.

This is a stipulated procedure, as I understand it. And then we'll give each side five minutes for their closing arguments. We will then allow any comments from the public. I'm going to limit those comments to two minutes. This hearing could drag on until late this evening, so I would ask you to hold your comments to two minutes each.

Mr. Michael Robinson who is a member of this Board has recused himself.

Mr. Domin and Mr. Goldstein, are there come stipulations y'all have agreed upon?

MR. GOLDSTEIN: We had some discussion about stipulations, but I believe I'll let Mr. Domin read them to make sure that we're both in agreement.

MR. DOMIN: It's my understanding it is going to be stipulated 904 Saint Andrews is located within the City of Charleston and zoned as a GB, general business zoning classification. It's my understanding – maybe I should do these individually.

Is that agreed?

MR. GOLDSTEIN: That's correct.

MR. DOMIN: I believe that it is going [5] to be stipulated that all of the videos and all the magazines at 904 Saint Andrews are of the type described in the ordinance, that being they are distinguished or characterized by their emphasis on matters depicting, describing or relating to specified sexual activities or specified anatomical activities.

There is no stipulation, however, that that is the only thing which is sold at the bookstore. In fact, it is the position of the moving parties here that there are other goods that are sold at the establishment.

This is a very important stipulation because I think it means as a practical matter we don't have to show a bunch of videotapes or show a bunch of magazines. I think we can agree that if there is a magazine, book or videotape over there at 904 Saint Andrews, it is of the type that is described in the ordinance.

Is that agreed?

MR. GOLDSTEIN: Mr. Chairman, that is an agreement, but I need a little clarification.

Mr. Domin served a subpoena on us to do an inventory count of everything at 904 for sale. We complied with that subpoena and have compiled a [6] count of every item located at 904 Saint Andrews for sale. Of that, many of the videos and magazines are classified as noncategorized. By that we mean that they arrive in such a fashion from the distributor that the manner in which they are brought to us does not indicate whether they show the defined prohibited anatomical areas or activities. Therefore, we don't know.

For purposes of this hearing we are conceding. We have counted those as adult materials, and so you have before you the total list. And so for purposes of this hearing we are stipulating that 34% of the items sold at 904 Saint Andrews Boulevard are those items that would fall within the definition of "Adult" under the city ordinance.

THE CHAIRMAN: Yes, sir.

MR. DOMIN: To be clear about that, the city is not accepting the stipulation 34% being the adult amount of stock. We believe that the amount is actually higher than that. However, we do accept that portion of the stipulation that all of the magazines and the videos and the books that are in the store are of an adult nature as defined by the ordinance.

[7] So there may still be discussion, debate and reason for you to rule on the actual percentages in this case. However, it should not be necessary, nor should you make it for your consideration, whether a particular book,

magazine or video is in fact an adult material as defined by the ordinance.

Is that a reasonable clarification of what you were saying?

MR. GOLDSTEIN: I think we're in agreement on that.

MR. DOMIN: It is my understanding that it is stipulated that while the bookstore challenges the constitutionality in the application of the ordinance, it is not disputed that if after all appeals are exhausted it is found that this is in fact an adult store, it is agreed that the GB zoning classification does not allow an adult book/video store, and thus the business would have to cease operating as an adult book/video store at that time.

MR. GOLDSTEIN: That's agreeable. We have agreed that because of the classification as a general business that if the court makes a final ultimate determination and found that this was an [8] adult business, it would naturally as a result of that have to cease doing business as an adult business, not as – it can do business as something else, but not as an adult business.

THE CHAIRMAN: Anything further?

MR. DOMIN: It is my understanding that it is agreed that this property was annexed into the city and at that time it came into the city as a noncomforming use. In other words, that it was operating within the county lawfully, and then by virtue of coming into the city it became a nonconforming use at that time.

MR. SIRKIN: That is correct. From what I clearly understood that at the time that the city annexed

this particular piece of property it was a lawfully operated adult bookstore at the time and the city was aware of its uses at the time that they annexed the business or that property.

MR. DOMIN: It's my understanding that it was operating in whole or in part as an adult bookstore and that we annexed it at that time. Correct.

THE CHAIRMAN: Any, other stipulations?

MR. REGAN: Just so that one part of the evidence may make a little more sense, the city [9] zoned this and amortized the use as an adult book store over a three-year period of time, which is now expired. Such uses are legal uses under the United States Constitution and they can be operated in areas in the City of Charleston that are zoned light industrial or heavy industrial, and the site itself is more than – it's at least a thousand feet from the location of a home, school or property zoned residential, and there will be some testimony or some discussion of whether or not there are any other locations that they can go to. I just would point that out to you to add some context.

THE CHAIRMAN: Anything further?

MR. SIRKIN: I believe, Mr. Chairman, it was agreed that we would be able to at the beginning to raise some constitutional issues that we believe we have to make at least initially to preserve the record; and if I may, I would like to go over those. It will only take a couple of minutes, and that way we'll have it in the record if it has to go to the court system.

No. 1 is we are challenging the ordinance itself in that we believe that it's unconstitutionally overbroad and in

violation of [10] the 1st and 14th Amendments, and we believe that we properly raised that issue to this Board under the Court of Appeals decision of South Carolina, Bishop versus High Tower which appears at 356 SE 2nd 420. It is a 1987 decision which says that one of the factors to be considered on appeal is whether the Board's decision is correct as a matter of law.

It is our position that if the ordinance itself is unconstitutional for any reason, then as a matter of law any decision that would be contrary to the continued existence of this particular business would then be contrary to law. So if the law is no good, then this whole proceeding and whatever action that this Board would take in affirming the zoning administrator would be contrary to law, but we feel that the definition of "adult bookstore" or "video store" as it's written in the ordinance is overbroad and vague.

We believe it's vague because it uses such terminology as "a substantial or significant portion of stock and trade of books, magazines, videos or other periodicals".

We have no problem in determining whether it contains the specified anatomical areas [11] or the specified sexual activity as described in the ordinance or as defined. However, the problem that comes up is determining what is meant by "substantial or significant portion of stock and trade", and also that this ordinance is written in a disjunctive because it also defines an adult book or video store as a place who has a substantial or significant portion of its stock and trade in the books and magazines, but also an establishment where the segment or section devoted to the sale or display of such material as would be an adult bookstore.

That means then – and we believe that it's unconstitutionally overbroad because in reality, then, that would make Barnes & Noble – it would make any other bookstore that's in the city that has a particular section that sells Playboy, Penthouse or any of the other male sophisticated magazines, because those usually are put in an area that is segregated from the rest. At least within the magazine racks they're all together, and that would then constitute a segment or a section which were devoted to the sale of these particular items.

In addition, it would in fact include – a lot of the video stores that are in the City [12] of Charleston would have to be located in the light industrial areas of the city because in some instances – such as Pic-A-Flick has a particular section of the store which is partitioned off and is considered only for adult videos, and so that we feel that those are stores you can't completely eliminate them and you can't – again, it's overbroad because it would include those.

In addition, we feel that the amortization that is only applicable and stated for a nonconforming use is only for an adult bookstore or video store, and any of the claimed secondary effects that I believe the city will attempt to use to justify the passage of the ordinance would equally apply to that which is defined as adult cabarets, and the adult cabarets – and I believe as you will hear the evidence that the city will put on – were most of the studies dealt with very often adult cabarets and that they have the same alleged secondary effects, and there is no amortization of those particular businesses. So therefore we believe there is a violation of Article 1 Section 3 of the Constitution of the State of South Carolina, in addition to the 5th and 14th Amendments to the United States Constitution.

[13] In addition, we believe that – and I think that the evidence is going to show – and I'm going to raise it as a constitutional claim right now – that the way the ordinance is written and the lack of number of locations available is the zoning ordinance as it applies to at least the adult bookstores is a zone-out and that we feel that it really provides a situation that there would be one adult business for every, I believe, 30 to 40 thousand people of this population. And we are prepared at the end of the hearing to give you case decision that says that that is inadequate in fulfilling the requirements of the 1st and 14th Amendments to the Constitution.

In addition, we attack and we believe that it cannot be severed apart that the definition of adult mini-theaters and motion picture theaters and adult motion picture theaters and adult mini-picture theaters is so overbroad that it is in fact unconstitutional and it would in fact require every home who has cable and who has purchased the premium channels such as Show Time or HBO or Cinemax – that they would in fact under this definition be considered an adult or mini-motion picture theater and would be in violation in the [14] residentials, and I'll read you and tell you why.

"An adult mini-motion picture is a theater – is an enclosed building with a capacity for less than 50 persons used for presenting material distinguished or characterized by the emphasis on matters depicting, describing or relating to specified sexual activities or specified anatomical areas as defined herein by observation by patrons therein."

You pay for Show Time; you pay a consideration for HBO. And it says "presenting material", and we all know

that it's general and common knowledge that they very frequently do in fact have the movies that are out in the theaters today that would contain the anatomical areas. Because it's the lower part of the breast below the areola would be considered that, and very often in those programs there is at least partial nudity and simulated sex.

In addition, it would apply to general movie theaters that might be located in the city, and that would be considered as adult motion picture theater; would also be considered to be adult businesses and would have to so locate; and by selectively coming after this particular [15] location, if in fact it is an adult bookstore, which we specifically deny, we believe that this statute or this ordinance as it was passed is constitutionally infirmed and should be stricken as being unconstitutionally overbroad.

We also feel that there was not the appropriate studies that were applicable to show that there are in fact the secondary effects, and that the studies that were considered by the city if any were not applicable to the City of Charleston. There are cities that are considerably larger. There is the city of Austin, the city of Houston, the city of Los Angeles, the city of Minneapolis which are considerably different metropolitan areas and that they're really not applicable to this particular location. So that we believe that the ordinance itself is unconstitutional.

The other argument that we do make is that it is being – there is a degree of an unequal protection of the law in that the amortization period that has been given in this as it relates only to the adult bookstores is a period of three years. The same ordinances of the City of Charleston provide an amortization period for signs

[16] that cost in excess of $10,000 is an amortization period of eight years. We believe at least at the minimum that certainly a business that has at least hundreds of thousands of dollars invested to its physical plan and remodeling and so forth is entitled to an amortization period that certainly would be equal to that which has been provided for signs in the city, and we believe that the application of this would be an unconstitutional violation of equal protection of the law.

Thank you

THE CHAIRMAN: Mr. Sirkin, that's all we're going to hear, I trust, on the constitutional issue.

MR. SIRKIN: That's correct.

THE CHAIRMAN: Does anybody disagree that this Board cannot make a ruling on constitution?

MR. SIRKIN: We disagree.

MR. GOLDSTEIN: I disagree.

THE CHAIRMAN: Well, I'm going to rule on that and we'll see where it goes, but we never have and I don't expect we ever will. And that statement, for the members of the Board, was to preserve the issue on appeal.

[17] MR. SIRKIN: I wanted to also indicate that the motels and hotels in the City of Charleston that do offer and have available either on command or do have provided cable that has Show Time and HBO or Cinemax would also – and I believe that I could introduce a movie guide of Show Time at least that shows the apparent ratings and descriptions of particular films that would in

fact contain the anatomical areas, and I only want to present that for the record.

THE CHAIRMAN: For the record, it's my understanding that the City of Charleston passed an ordinance which provided in 1999, February of 1999, that adult book/video store uses as defined in Section 54-120 of the zoning ordinance operating as legal, noncomforming uses shall be amortized and discontinued three years after the effective date of this ordinance.

It is further my understanding that at the expiration of the three years that Mr. Batchelder informed the appellant that under that ordinance they needed to cease and desist from the business of adult book and video store.

Section 54-120 defines adult book/video store as follows – and I think that the members of [18] the Board have a copy of this ordinance. It defines that as "an establishment having a substantial or significant portion of its stock and trade books, magazines, videos and/or other periodicals which are distinguished or characterized by the emphasis on matter depicting, describing or relating to 'specified sexual activities' or 'specified anatomical area' (as defined herein) or an establishment with a segment or section devoted to the sale, rental or display of such material.

"Adult book/video store uses as defined herein operating as legal and nonconforming uses shall be amortized and discontinued three years after the effective date of Ordinance No. 1999-08."

It is my understanding that the issue before this Board is whether Mr. Batchelder's decision that the appellant – the correctness of Mr. Batchelder's decision

that the appellant is operating an adult book and video store.

Mr. Domin, do you have any problem with that?

MR. DOMIN: It is correct that it's a determination that the Board should make as to whether or not this is an adult book/video store

* * *

[28] LEE BATCHELDER

being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DOMIN:

Q. Could you please state your name for the record and tell us the position you have with the city, how long you've been with the city.

A. Lee Batchelder. I am the zoning administrator for the City of Charleston, and I've served in that capacity for 13 years.

Q. Can you give us a thumbnail sketch of your educational background as it relates to planning and zoning matters.

A. I have a Master's degree in urban planning from the University of Virginia, I am a member of the American Institute of Certified Planners, and I've had about 20 years of professional experience in this field.

Q. Do you attend various continuing education seminars, keep up to date on matters of planning and zoning?

A. Yes, I do.

MR. DOMIN: We would tender this witness as an expert in the area of planning and zoning.

[29] MR. GOLDSTEIN: No objections.

BY MR. DOMIN:

Q. Let me show you Exhibit 1. Although the chairman has read in all of the relevant definitions, I want to make a clear record and ask if you can identify Exhibit 1 as the zoning laws of the City of Charleston that are applicable to this matter.

A. Yes. These are page's out of the City of Charleston's zoning ordinance.

Q. Let me show you Exhibit 2, which would be the actual ordinance itself, including the "whereas" clause as it related to the original ordinance in 1982.

A. Yes. This is the ordinance identified in 1982 by city council.

Q. Exhibit 3, the actual ordinance itself including the "whereas" clause is amending the ordinance to include video and definition of adult book and video; is that correct?

A. That is correct.

Q. And finally Exhibit 4, the amortization ordinance passed in 1999.

MR. SIRKIN: Can we ask for copies of what are being shown?

[30] MR. DOMIN: You have a stack. That's what I handed you earlier. You have this and the other stack which I indicated was the exhibits that were going to be introduced in order.

A. That is correct. Exhibit 4 is an ordinance adopted in 1999 to council.

MR. DOMIN: We would ask to move those into evidence as Exhibits 1 through 4.

MR. CHAIRMAN: Any objection?

MR. DOMIN: Any objection to 1 through 4?

MR. SIRKIN: Can we have a second to look at them?

MR. DOMIN: Certainly.

MR. SIRKIN: We have no objection.

MR. DOMIN: 1 through 4 without objection.

BY MR. DOMIN:

Q. Mr. Batchelder, can you tell us just in general are there studies which discuss the impact of sexually oriented businesses on communities?

A. Yes. There are a number of studies that have been done over the years on various communities on the effects of adult uses.

Q. What are some of the effects –

[31] MR. SIRKIN: We object to any of the effects. The only effects that are important are those that are applicable to the City of Charleson and not in general as to other cities.

MR. DOMIN: Actually I think the case is very clear that the city does not perform its own studies, that they rely upon other studies from other cities as well as just general observations.

MR. SIRKIN: Objection. As long as they're applicable, they would be applicable to the particular community that is accepting those studies, and unless a foundation is made we object.

THE CHAIRMAN: Your objection is noted.

BY MR. DOMIN:

Q. In general what do these studies say about the impact of sexually oriented businesses on neighborhoods, on property values and on communities?

A. They know that adult uses can adversely affect property values, that they can create an environment that results in more criminal activity, and that they can be certainly bad influences on neighborhoods.

Q. Now, have you reviewed some of the studies that have so concluded?

[32] A. Yes, I have.

Q. Let me show you Exhibit 5.

Have you seen the studies that you've made review of?

A. Yes. These are copies of studies from document that I have reviewed.

Q. Now, do you believe that these studies are relevant to a city such as Charleston, South Carolina?

MR. SIRKIN: Objection, unless there is a predicate foundation made for that question and request for an opinion.

MR. DOMIN: I'm laying a foundation for his expertise. I think he's qualified as an expert.

THE CHAIRMAN: Gentlemen, where are you going with this?

MR. DOMIN: It is specifically stated that one of their positions is that we will have to proof [sic] and show negative secondary effects. I believe that is contrary to the law, but nevertheless I'm rising to the challenge, that being that businesses of this type have substantial negative effects on the community in terms of decreased property values and other problems. It

* * *

[62] A. Yes, they do.

Q. Is there a downward spiral effect that once a neighborhood starts deteriorating, the property values start going down?

A. Yes. I think that once there is an adverse impact that can cause a lack of investment or appreciation in the neighborhood, then that in effect causes other problems and you get into that downward spiral where it gets worse instead of better.

MR. DOMIN: That's all the questions I have for this witness.

THE CHAIRMAN: We're going to take a short break before we have cross-examination.

(Short recess taken.)

THE CHAIRMAN: Let the record reflect that Mr. Rosen joined us long ago before any testimony was taken, and I failed to announce that.

Mr. Sirkin and Mr. Goldstein, the witness is yours.

CROSS-EXAMINATION

BY MR. SIRKIN:

Q. Mr. Batchelder, you indicated that you have made some estimate to the number of items or at least the percentage of those items in the [63] store.

Did you do any type of count?

A. I didn't count every video or magazine in the store. I estimated the total number just looking at the number of racks in the store and trying to estimate how many videos or magazines were in each rack unit.

Q. Did you do that in relation to all the other inventory that was in the store?

A. As far as the lingerie goes, I did not do much in the way of counting or even estimating on a per rack basis. That becomes a little bit more difficult because it's pieces of clothing that are of various sizes. But I mean, just an overall guess as to how many items were in that space – you know, I spent a few minutes in there just looking around and trying to come up with it. So that's how.

Q. The fact of the matter is, you didn't do an actual count, did you?

A. No.

Q. And how much time did you spend in the store when you were doing this estimate?

A. The first time I visited the store I was there about 45 minutes. The second time I was [64] in the store I was there for about 40 minutes.

Q. And did you write any notes down as you went through the store as to the number of items? Did you do a contemporaneous estimate while you were in the store?

A. I made some calculations in my head and then took notes after I left the store.

Q. And then obviously it was sometime after you left the store that you wrote down what you thought was the best of your recollection, but it wasn't based on a physical actual count?

A. Right.

Q. And you would agree with me that the only items that should be counted by definition in the ordinance would be those which would be books, magazines, videos and other periodicals that would relate to printed matter, would it not, the periodicals?

A. Right.

Q. It would not involve anything that was like, say, a vibrator or anything that would be considered a novelty or a sex toy?

A. Right.

Q. Did you do a count of those?

A. Of the sex toys?

[65] Q. Yes.

A. No; I did not do a hand count of those either.

Q. And there were several in the counter and elsewhere. There were lotions and a lot of other type of items that were in the store. Did you do a count of those?

A. No, I did not.

Q. And you would agree with me that all those items would constitute stock and trade, wouldn't it?

Would you agree with me that stock and trade are items that are being offered to the public to buy or to rent?

A. Yes.

Q. And so you didn't even count – there are several things in the store that you didn't even count then; agreed? You didn't count the toys; you didn't count the lotions and several other miscellaneous items.

A. Well, I didn't count anything. I came up with these guesstimates in my head when the facts were in.

Q. Can you give me a total number of what you believe the number of videos were in the store?

[66] A. I would say on my first visit to the store, which was in like January, there were somewhere in the neighborhood of 4,000 videos.

Q. Can you tell me how many were there when you were there on the second time?

A. I would say the number had decreased a bit. It seemed to me that the amount of inventory in the adult videos had decreased maybe – for whatever reason I don't

know, but that the racks had fewer videos on them and maybe that the amount – the number of videos had dropped by, say, 500 or so.

Q. So that's something that could in fact could be controlled, couldn't it, in getting the balance of the numbers down?

A. Certainly.

Q. Did you say to anybody at the store to to say: Hey, look. To get your inventory not to be considered significant or substantial, that there is a certain figure or number that would meet that – would be under the threshold of making the distinguishment between –

A. No.

Q. You didn't do that?

A. I didn't say anything to anybody.

[67] Q. Can you tell this Board and myself and Mr. Goldstein what that threshold percentage would be or the numbers?

A. What threshold would be what?

Q. That makes the difference between it being a substantial or significant portion of stock and trade or less than that.

A. I can't give you a specific number, but my guess is that –

THE CHAIRMAN: Don't guess.

A. But my opinion is that if we were talking about an unsubstantial or insignificant number –

Q. Give me a percentage.

A. – that would be somewhere below 10%.

Q. What do you base that on? Does it say anywhere in the ordinance? Does it define the term "significant" or "substantial"?

A. No; it does not define it.

Q. Has anybody given you a figure to say what is significant or substantial?

A. No.

Q. In other words, it's what you decide?

A. That's correct.

Q. And have you made a decision and [68] published what you believe that figure is?

A. No; I haven't make [sic] a decision and published any figure.

Q. So that basically it's what your guts tell you when you go and look at some places? It's completely your discretion?

A. It's my professional opinion.

Q. Based upon your own discretion?

A. That's correct.

Q. Nobody has given you any definition? City Council hasn't really defined those terms, have they?

A. That's correct.

I would add, though, that in some publications they do talk about percentages and where you are moving away from the substantial and significant, and 10% has been a number that has been used in some of those publications.

Q. And they've done that because of the problem with defining term like "substantial" and "significant", haven't they?

A. I'm not sure exactly why they've done that.

Q. You're familiar with studies and you follow all this that goes on throughout the nation.

[69] Isn't it correct that New York defined "significant" or "substantial" to be 60/40 percent in inventory?

A. I'm not sure what New York decided in the end.

Q. But they at one point made a decision that if your inventory is 60% nonadult and 40% adult, you're not an adult bookstore; correct? At one point they made a decision like that, an agreement?

A. I'm not sure about any agreement that they made.

Q. But you certainly have not attempted to come in and talk to anybody or to Mr. Goldstein to try to come up with some area of percentage that would make the distinction between adult versus it being not adult?

A. I haven't been asked that question.

Q. Are you familiar with the Pic-A-Flick case that came out of the South Carolina Supreme Court?

A. I have not read that decision. I have heard a little bit about it, but I haven't read it.

Q. You've heard a little bit about it.

Does what you've heard about it give [70] you some indication that there was some concern about not defining terms in the City of Columbia's ordinance?

A. Is that what I've heard?

Q. Yes.

A. Well, what I've heard is that there was some testimony in that case that I wouldn't agree with.

Q. But the Supreme Court of South Carolina did make a finding that there was language in there that talked about and used the word "primary" was unconstitutional and vague, didn't it?

MR. DOMIN: Object; legal conclusion.

MR. SIRKIN: I will let the case speak for itself.

BY MR. SIRKIN:

Q. Now, you spoke of studies.

Were you the zoning administrator back in 1982?

A. No, I was not.

Q. But you would agree with me that prior to the annexation of the property on which this store is located that there at least is some studies that are referred to in the minutes of City Council?

[71] A. Yes.

Q. And those studies also included not just what would be considered "adult bookstores" but it also included

show bars and cabarets and other type of adult businesses; is that correct?

A. That is correct.

Q. And in describing secondary effects, it related the secondary effects across the board. It said something about bookstores; it said something about show bars or cabarets; it said something about massage parlors having secondary effects; correct?

A. That's correct.

Q. Are you familiar with a location called Jokers in the City of Charleston?

A. Yes, I am.

Q. Is it fair to say that that is an adult cabaret?

A. Yes, I believe.

Q. And that would meet the definition?

A. Yes.

Q. Would you also agree with me that within probably 150 feet is a residence?

A. I'm not sure of what the distance is, but I know that there are residential properties.

[72] Q. And that property has not been designated to be amortized, has it?

A. That's correct.

Q. And it's been excluded.

Would you also agree with me that at least these studies in 1982 – do you know when the property where

this particular store is was annexed to the City of Charleston?

A. The store at 904 Saint Andrews Boulevard?

Q. Yes.

A. I believe it was 1994.

Q. So at least, though, for some substantial period of time this store existed and it was a conforming use in whatever unincorporated or corporated area it was in before it became part of the City of Charleston; is that correct?

A. I'm assuming it was a legal use. I don't know for sure.

Q. You wouldn't argue with me if I said it was a legal use?

A. No, I wouldn't.

Q. And it was taken into the city as a legal use, wasn't it?

A. That's correct.

[73] Q. And when it was taken into the city, there was no amortization for that particular property, was there?

A. That's correct.

Q. It was sometime thereafter that a decision was made then to amortize just the adult bookstore businesses or what you would define as an adult bookstore business?

A. Adult book/video store.

Q. And you claim it was based upon negative effects.

Can you tell me if crime has increased at that location, 904 Saint Andrews, from 1994 to 1998 or '99 when this ordinance was passed, the amortization for the book/video stores?

A. I would refer you to the police department.

Q. You have no figures in relation to that?

A. I have no figures.

Q. Can you tell me what real estate was doing and what it was selling for in 1994 as compared what it's selling for, say, currently or in 1998, '99 or 2000?

A. I don't have any figures, no.

[74] Q. So you have not gone out and made any study as to whether the real estate values have gone up or down because that store is there?

A. No.

Q. So when you said the secondary effects and you talked about all these studies, you have no idea if there has in fact been a property decrease, value decrease, at that location or in that area as a result of this store being there?

A. I think –

Q. Don't tell me what you think. Answer my question.

THE CHAIRMAN: He can tell you what he thinks.

A. Well, I mean, I think that there has been a negative effect on that area just in simple – in my work observing areas and properties within the city, which is what I do in my past with zoning.

Q. Tell me how the property has gone down. What percentage has it gone down? What has the property sold for? Give me a specific example.

A. I can't give you any specifics, but I know that the property immediately to the back of this particular location has been a property that [75] has been dilapidated in a sense and that there have been problems in trying to spur development back there, and I think it's because of this business being located there.

Q. Do you have any written documentation for that conclusion you just made?

A. No; I don't have any written documentation.

Q. So again, that's just your reaction and your opinion on that?

A. That's correct.

Q. Do you know whether that property has gone down in value since the time that the city annexed it from before when it existed in that area? Was there any change as a result of the annexation? Anything different?

A. I don't have any figures on that.

Q. So basically the city took it. This is what it was. There is essentially nothing different that you can relate from the time it was taken by the city.

Did the city take any other property in that immediate area back in 1994 when they annexed this particular property?

A. Did they annex any of the property?

[76] Q. Yes; in that general vicinity.

A. I believe that this property was part of a larger annexation, including a number of properties in that area.

Q. But they took it all together as it was?

Have there been any amortization or change in relation to the additional property that was taken or was annexed?

A. No.

Q. Do you know of anybody who has refused commercially to move into that area, to that commercial area, as a result of this bookstore?

A. No, I do not.

Q. Are you familiar with the ordinances and the amortization schedules relating to signage?

A. Yes, I am.

Q. What is the amortization schedule for that?

A. I think the maximum period of time, if I recall correctly, was ten years for signs that had a value of maybe more than $10,000, as I recall. I haven't dealt with that recently, but there was a phase removal of signs based on their value, their construction costs.

[77] Q. So if their value was $10,000, they have to be amortized after eight years or ten years?

A. Eight years.

Q. Would you agree with me that a business in a particular location builds up a certain amount of goodwill to its customers by the fact that it's located – people begin to know it, that it's there and exists there? That has a value, doesn't it?

A. I don't know if it does or not in this case.

Q. You do know, though, that when businesses are forced sometimes to relocate they do have a loss of a certain amount of customers, don't they?

A. I don't know that either.

Q. Would you agree with me that certain locations are better for a commercial establishment than others? Based upon your professional background.

A. Yes; I would agree with that.

Q. And would you say to me that a location in a commercial area that is commercial for retail business would certainly be better for a retailer than a light industrial area, would it not, based [78] upon your education and background in urban planning?

A. Generally speaking that may be the case.

Q. It may be or it would be the case, wouldn't it?

Are there any other retail businesses located in these light industrial areas where the city has designated for an adult video or bookstore that are retail businesses?

A. I don't believe so. There is one retail business that's across the street from the site on the Cainhoy peninsula that is a retail business.

Q. So you can think that there is only one retail business located –

A. In the same type zone.

Q. So you would agree with me, then, it would be a less desirable location for a retailer to be located, would it not, in a light industrial?

A. Well, in the City of Charleston of course we have some areas on the lower peninsula that are zoned light industrial. The area by the visitors center, for instance, is zoned light industrial, and there are lots of retailers in that [79] area that do just fine. The city market was zoned light industrial until just a few years ago.

So there are some areas that are attractive for retail purposes, but for the most part I would say that in the City of Charleston there are many light industrial areas that would not be –

Q. Can a retailer go into a light industrial area? Can they locate a business in a light industrial?

A. Yes.

Q. They can do that under your zoning code?

A. Yes.

Q. How many have actually done that? Do you know any number?

A. I couldn't give you a number offhand.

Q. Can you tell me the number of adult video stores there are in the City of Charleston?

A. As far as I know, there is only one.

Q. And that's this particular business?

A. That's correct.

Q. And do you know what the population in this city is?

A. It's approximately 100,000 people.

[80] Q. Would you agree with me, then, that according to that and the fact that the only other – would you agree that the only other adult business in the City of Charleston is Jokers?

A. No; I wouldn't agree to that.

Q. What other ones are there?

A. Diamonds.

Q. Is that in the city, or is that in an unincorporated area?

A. That's in the City of Charleston.

Q. What about the club across the street? What is it called, Wet and Wild?

A. Wet and Wild and the Southern Belle. Those are not within the city limits of Charleston.

Q. So you don't count that as being within a thousand feet of each other?

A. No; I would count that. Diamonds was there first, and we have no authority over the property outside of our jurisdiction.

Q. So there are three locations that are adult that would be categorized as adult businesses in the City of Charleston?

A. That's correct.

Q. And of those three businesses only one is – well, you're interpreting it as an adult [81] video store. We're claiming that it's not, but you're claiming that it is.

You talked about and there were some questions about Pic-A-Flick and Hollywood and so on.

Are you familiar with the Pic-A-Flick that's in the City of Charleston?

A. No, I have not gone.

Q. And you've never gone in there. So if I told you that they had a segregated area that's a separate area that just strictly has adult videos in it, would that then be considered under your ordinance a segment of the store that is singularly designated for adult and would come under the ordinance as an adult video store?

A. I would have to inspect the property and make that determination.

Q. So you don't know what kind of videos, then, they have available.

When you were answering questions for the city about what material was inside the Pic-A-Flick, you were just guessing, weren't you?

A. Well, I was using my experience in going to some other video stores.

Q. But it wasn't in particular the [82] Pic-A-Flick.

Have you been in the Hollywood video store that's in the city?

A. Yes, I have.

Q. And do they have a designated area where they have adult?

A. Not to my knowledge they don't.

Q. Do they have R rated? Do they have an area that's designated as R rated?

A. Not to my knowledge.

Q. Do they have any videos in there that you – you would agree with me that the definition of "adult video" isn't just that which emphasizes a specified sexual activity, but it also talks about specified anatomical areas.

A. Right.

Q. And so a specified anatomical area is defined in the ordinance, isn't it?

A. Right.

Q. And could you tell us what that definition is.

I think it's specifically defined, and it doesn't say anything about "emphasis on" or anything like that. It just merely says "specified anatomical area means" –

[83] A. "It means a less than completely and appropriately covered, 1, human genitals, pubic region; 2, buttocks and, 3, female breasts immediately below the top of the areola; and B, human male genitals in a discernibly turgid state even if completely or opaguely [sic] covered."

Q. So that if it shows any one of those, then it would be considered adult material for the purposes of this ordinance?

MR. DOMIN: Objection.

THE CHAIRMAN: Go ahead and answer.

A. I wouldn't agree with that.

Q. Why? It says it means "less than" and it goes on and defines the various areas that would be considered.

A. Because that definition fits into the definition of what an adult book and video store is.

Q. You would agree with me it says – in the ordinance it uses the term "or an establishment with a segment or a section devoted to the sale" of all that.

A. I agree that that wording is in here.

Q. And so, again, you're interpreting those words as you decide to interpret them, not as [84] they are written anywhere in the ordinance?

A. No. I'm interpreting them as written in the ordinance and applying them as written in the ordinance.

Q. Well, how are you implying it?

If it contains those particular specified anatomical areas, then the question comes as to whether the store has a segment that's devoted to such material.

A. Well, I think – and whether it's categorized by their emphasis on a matter depicting that.

Q. It doesn't say that. It actually is in the disjunctive, is it not? The word separates the two parts of that definition, doesn't it?

A. Right.

Q. It's one or the other. If it's one or the other, it then meets the definition of an adult bookstore, video store.

A. Well, I wouldn't go that far, though. I would say that – again, reading this together, that the store would have to emphasize that type of material.

Q. Where does it say that the store would have to emphasize that sort of material? Does it [85] say that?

A. Those are words from this definition.

Q. Well, you're taking the words and putting them the way you want them to read; right? That's how you interpret it?

A. I applying them as I think they're written.

Q. As you think they're written.

Would you agree with me that when you go into Barnes & Noble or a convenience store that has a rack that has adult magazines such as Playboy or Penthouse, those are usually together, aren't they, on the rack? I mean, they're side by side.

A. Right.

Q. So that's a segment of that particular rack that has that.

Would you agree with me that those magazines contain the specified anatomical areas that's contained in the definition here?

A. Yes.

Q. So you chpose [sic] not to apply the ordinance to that type of business because you in your opinion say that's different than what you have determined as being at C & C Video?

A. Yes.

[86] Q. And again, you didn't do any count on the products and you can't give us a definition of what "substantial" or "significant" means in stock and trade?

A. I can't give you a specific percentage, but I would just say again that I think when you get below 10% you're becoming –

Q. Where does it say that?

MR. DOMIN: Let him finish the answer.

A. That when you get below 10% you're becoming insubstantial and insignificant.

Q. Again, that's your definition.

Suppose I suggested to you that if it were less than 40% that that should meet it.

"Substantial" means a lot. It means a significant amount, doesn't it?

A. It means a substantial and significant amount.

Q. Give me a percentage.

Where in the ordinances in the City of Charleston are those terms defined?

A. They're not defined in the ordinances.

MR. DOMIN: It's been asked and answered.

MR. SIRKIN: I have nothing further.

[87] REDIRECT EXAMINATION

BY MR. DOMIN:

Q. Just briefly, you indicated that in the Pic-A-Flick case that there was some testimony from the claim administrator up there in Columbia that you didn't agree with.

Do you remember what that related to?

A. I think it had to do with whether a movie called Titanic was considered an adult video or something to that effect, and I believe that the testimony said or indicated that it was because of the nudity that was part of that movie; but again, I would not agree with that.

Q. You would not agree with that as applied to the City of Charleston's ordinance because that would not be a movie that was characterized or distinguished by its emphasis on such nudity and sexual acts?

A. Right. That's correct.

Q. Has the City of Charleston been reasonable and consistent in that position? Have you ever interpreted this ordinance as against purveyors of movies such as Titanic or other R rated movies?

A. No, I have not.

[88] MR. DOMIN: That's all the questions I have.

RECROSS-EXAMINATION

BY MR. SIRKIN:

Q. You agree, then, zoning people – different people can interpret it different ways, can't they?

A. Yes; I would agree with that.

Q. And you disagreed with the interpretation of the gentleman from the City of Columbia?

A. Yes.

Q. And you obviously disagree with my definition.

A. Yes.

Q. And you might disagree with Mr. Goldstein's definition.

A. I might.

Q. But there is something that says which one of us is right, is there? It's sort of we've got to guess. You've never published what you think it is, have you?

A. That's correct.

Q. And you've never been given someone from the city counsel – there is nothing that [89] prevents City Council from giving a percentage, is there?

A. No. City Council certainly couldn't adopt an ordinance with a percentage.

Q. Have they said in that ordinance that it's your discretion? It's the zoning administrator's call?

A. In the city ordinance?

Q. Yes; in the city ordinances.

A. In the zoning ordinance, yes, they do.

Q. They just tell you it's your function to interpret it, but it has to be in accordance with law?

A. That's correct.

Q. And so you would agree with me when dealing with 1st Amendment material, since you're familiar with the law as relates to 1st Amendment issues, that there shall not be unbridled discretion? That's a cardinal rule, isn't it?

MR. DOMIN: Objection; conclusion of law.

BY MR. SIRKIN:

Q. Do you know that? That's written law. You learned that in your studies as an urban planner, didn't you?

[90] A. Learned –

Q. That unbridled discretion is a no-no when dealing with 1st Amendment protections.

A. I don't know that I've ever heard that term used.

Q. Have you read any of the cases dealing with –

THE CHAIRMAN: Mr. Sirkin, I don't think that makes any difference.

MR. SIRKIN: Well, I think the cases will speak for themselves, but he's been qualified as an expert and he's giving an opinion, and I think I have a right to go into that opinion.

THE CHAIRMAN: I think we're going to be here all night and I don't see that that – and please, audience, please don't speak out. In order to grant a fair hearing we can't have you talk out.

MR. SIRKIN: I have no further questions.

* * *

[133] THE CHAIRMAN: Mr. Wickman, if you will come forward.

THE WITNESS: My name is Brad Wickman.

THE CHAIRMAN: Have a seat, Mr. Wickman.

BRAD [sic. Fred] WICKMAN

being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GOLDSTEIN:

Q. Mr. Wickman, your background. You're a realtor?

A. I hold a broker's license for the last 37 years. I'm a past president of the real estate board, past president of MLS. I'm a native Charlestonian. My office is located at 768 Saint Andrews Boulevard, two blocks away from the video store, and I've been there for 13 years in that location.

Q. Have you ever been qualified as an expert witness in a real estate matter before?

A. Yes.

MR. DOMIN: I have no objection of qualifying him as an expert in the area of real estate. He holds the qualifications.

[134] BY MR. GOLDSTEIN:

Q. Mr. Wickman, you were requested by me on behalf of our client to look at some maps provided by the city.

A. Right.

Q. And I agreed to pay you for your time?

A. I was impressed by Mr. Batchelder's work. He can come to work for me any time. He really did a great job searching it out, but the majority of the properties that he turned up are really not practical. There are a couple of them I want to check out.

I have done a search for this business. The majority of these properties Mr. Batchelder turned up are either big tracts of land or located in remote areas that are not practical for this business.

Q. Based on your many years' expertise as a realtor and based on your review of the maps provided by Mr. Batchelder on behalf of the city do you have an opinion as to whether or not there are there any or are not any readily available parcels in the proper zone that are readily available for use as an adult business?

A. I have gone over these maps and spotted [135] a couple of places, but have turned out not to be practical or possible. So I do not think that there is a suitable place that I've been able to locate.

Q. Lawyers sometimes use a slang, "zone-out"; the place has been "zoned out."

Are you familiar with that term, that slang term "zone-out"?

A. I understand what you mean.

Q. Is it your opinion that C & C Video, if it were found to be an adult business by this Board, has been effectively zoned out?

A. That's what it looks like.

Q. Now, how far did you, say your office is from Saint Andrews?

A. Two blocks.

Q. How long have you been located two blocks away?

A. 13 years.

Q. Has your business and your property gone up or down in value?

A. The value of my property evidently has increased because the tax assessors are billing me more taxes every year and the building immediately next to me has changed hands twice in the last [136] three – four years, and it's gone up in price each time it has changed.

Q. Are you familiar with any real estate in the general vicinity of Saint Andrews Boulevard anywhere

near C & C Video that has gone down in value over the last ten years?

A. No, I am not.

Q. You haven't been asked to determine whether VMI or C & C is an adult business? Nobody has asked you to do that?

A. No.

Q. Has your property been adversely affected by its proximity to C & C Video?

A. It was adversely affected when I first bought it because it was broken into by some less desirable residents out of Maryville or Ashleyville three times within the last 30 to 60 days. I don't think they had any connection with the video store.

MR. DOMIN: I'm going to object to lack of any foundation.

MR. GOLDSTEIN: I will lay the foundation.

A. We caught them. Rubin Greenberg was there and assisted in arresting the people from Maryville.

* * *